

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 10, 2008 Session

WALLACE R. CORNETT, JR. v. ELIZABETH PAYNE BURTON

Appeal from the Circuit Court for Davidson County
No. 06C-2311 Barbara N. Haynes, Judge

No. M2007-02422-COA-R3-CV - Filed November 24, 2008

Wallace Cornett, Jr. (“Plaintiff”) sued his ex-wife, Elizabeth Payne Burton (“Defendant”), for malicious prosecution. After all the proof had been presented, the Trial Court granted Defendant’s motion for directed verdict finding and holding that “reasonable minds could not differ on the proposition that the element of lack of probable cause was not proved by the Plaintiff...” Plaintiff appeals to this Court. We vacate and remand this case to the Trial Court for a new trial.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated;
Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J., and SHARON G. LEE, SP. J., joined.

Larry L. Roberts, Nashville, Tennessee for the Appellant, Wallace R. Cornett, Jr.

Russ Heldman, Nashville, Tennessee for the Appellee, Elizabeth Payne Burton.

OPINION

Background

This appeal involves the Trial Court's decision to grant Defendant's Motion for Directed Verdict after the close of all proof. As such, it is necessary that we discuss in detail the evidence presented at trial.

Plaintiff and Defendant were divorced in 1995. They have one minor child ("the Child") born of the marriage. On Christmas Eve of 2005, Plaintiff went to Defendant's house to pick up the Child so that Plaintiff could exercise his court-ordered visitation. An incident occurred that resulted in Defendant's swearing out a warrant and Plaintiff being arrested on domestic assault charges. The criminal charges against Plaintiff were dismissed at a preliminary hearing in June of 2006. Plaintiff then sued Defendant for malicious prosecution, and the case proceeded to trial before a jury.

Defendant, who is a certified registered nurse anesthetist, testified at trial that she has custody of the Child. The Child was twelve years old at the time of the incident at issue in this case. Defendant testified that approximately one month before the incident, Plaintiff called and told her that although his scheduled visitation was to begin on Christmas Eve, he did not plan on picking the Child up until Christmas morning. Defendant testified that contrary to Plaintiff's earlier call, he arrived at her house at approximately 8:35 p.m. on Christmas Eve. Defendant stated:

The doorbell rang, and I had my gown on so when I opened the door, the first thing that came out of his mouth was sort of in a loud voice, did you get lots of good stuff? And I then said, I thought you were coming in the morning, so he hasn't opened his gifts yet. But [the Child], he was in the den watching TV, and I said, you know, when you called, you said that I'll pick him up in the morning so he can open his gifts.... But anyway, he comes into the house, and I said, he's not ready yet. I will have him get ready. Let me tell him that you're here.

Defendant testified that Plaintiff said that he was a little early and would wait in his car. Defendant testified that the Child went to his room to change from his pajamas into clothes and then went out to Plaintiff's car. Defendant also went outside and stood on the front step when the Child went out to Plaintiff's car. Defendant stood approximately twenty feet away from Plaintiff's car. Defendant testified:

I was standing on the front step, and he's parked in the driveway, and I really - - you would have to ask [the Child] what he said to his father, because I couldn't hear that well. He's in the driveway. I'm on my front porch....What I heard next was

[Plaintiff] started to scream, and he's screaming at [the Child], and I couldn't hear what [the Child] said, but [Plaintiff] starts screaming, get your bag, get in the car. Get your bag. And he was like back and forth, and I'm standing there thinking - - well, [the Child] doesn't really know quite what to do either, because he's telling him to go in, get your bag, get in the car, get your bag. I mean, that quick. And that's what I heard him say.

Defendant testified that the Child was facing Plaintiff and then "[Plaintiff] grabbed [the Child] and turned him around. He jerked him around...He brought him back with his fist and struck him." The Child then ran to Defendant. Defendant further testified:

I'm trying to think about the time. It was time enough that when [the Child] runs to me, and I run to him, I come off the steps when I see the blow, and he actually, like, grabbed me. I guess in fear and not knowing what he's going to do next. I thought, I need a witness or I may need help. It's just me and him and again, I've got my gown - - I'm in my pajamas. I saw Rita in the window, and I said, Rita, Rita, and she heard me. She came out, and she said - - I said, [Plaintiff] hit [the Child]. And she said, do you want me to call the police? And he said, that's bullshit. Yeah. Call them. And he's screaming and hollering, and we're both actually just sort of, like, you know, holding each other.

Defendant testified that Plaintiff drove away a few minutes later.

When asked if she looked at the Child's back to check for injuries, Defendant stated: "Not till I got in the house. He struck him. He ran to me. I called for help....I didn't at the time he struck him look at his back. I was trying to get some help. I was terrified." Defendant stated: "I asked [the Child] where he was struck, and I saw it was the lower back area." When asked if the Child required any medical attention, Defendant stated: "We didn't go to the hospital. I didn't think his back was broke. He was able to stand up and run to me." Defendant testified: "I looked at [the Child's] back when I went in the house. I saw the strike. I asked him how hard he was hit. He said, very hard. But you can ask [the Child]. You know, we certainly - - he's honest. You can ask him." Defendant testified that when she looked: "I didn't see a bruise, because it was just so recent. I'm sure it would take time. His back was red."

Defendant was asked when she swore out the warrant for Plaintiff's arrest and she stated:

Thirty minutes. Maybe later. Or 45 minutes maybe. Whenever the police came, the police - - I told the police, I said, "I am really nervous." This really scared me, and the police said, I will take you. It was a rainy, bad night, and so it was 30 minutes to probably drive downtown from my house, so I would say an hour or so.

When asked why she made the decision to swear out a warrant, Defendant stated:

I was scared and frightened from the whole night and incident, and when the police came, they asked me what happened, and I told them, and you know, I said, well, you know, what should I do? And they gave me that advice. And I said, you know, just like, if you told me to drive down. I said, there's no way that I could drive downtown, that scared me so much, and I'm nervous, and they said they would take me. And I had no idea any of this night would happen at all. And it certainly, you know, is a nightmare and something that, you know, even monetarily when I try to work so hard and provide for my child that someone is trying to take this and destroy us both.

Defendant testified that when she went to swear out the warrant she filled out some paperwork, went before a judge, was placed under oath, and answered questions truthfully.

The following exchange between Plaintiff's counsel and Defendant occurred at trial:

Q. When you went down to the police station, did you tell the magistrate when you swore out the warrant that my son is hurt? He has a bruise. He has a red mark. Did you say that then?

A. I'm sure I told him what I saw.

Q. But you hadn't seen it at that time?

A. I saw his arm, and I saw him strike my son.

Q. You hadn't looked to see if there was a mark?

A. I saw him strike my son with his fist. He brought his arm back as fast as he could.

Q. Ma'am, you had not seen whether [the Child] was hurt or not. You hadn't seen a red mark or a bruise.

A. Oh, we were hurt.

Q. And you told the commissioner and the police that he was bruised and injured, and that wasn't true.

A. Oh, yes, sir. We were bruised and injured, and you can take those bruises and injuries far deeper than something on the skin.

Q. You hadn't even looked at him at the time; had you?

A. Yes, sir. I saw the blow. I saw the strike. My close examination was not outside.

Q. As a matter of fact, this is all an effort on your part to stop his visitation once and for all; is that correct?

A. No, sir. I've never tried to stop his visitation.

Despite Defendant's testimony that she had never tried to stop Plaintiff's visitation, she did admit that she previously had been found in contempt of court for interfering with Plaintiff's visitation.

Defendant testified that this was the first time she had ever seen Plaintiff strike the Child. However, Defendant alleged that Plaintiff had struck the Child previously and stated: "The

one in November, I did not report to Human Services. But I did confront [Plaintiff] about it, and I also called Mr. Robinson, my attorney, over the incident.” When asked, Defendant denied telling the Child that he did not have to go with his father on that evening.

Plaintiff testified that he is “employed at the Tennessee International Guard, Nashville, Tennessee. I’m a guardsman, and I’m also a full-time federal technician. I’m a pilot instructor and also Chief of Safety for the unit.” Plaintiff holds the rank of Lieutenant Colonel and has held his positions for over twenty-seven years.

Plaintiff testified about problems he has had when trying to exercise visitation with the Child stating:

Continuous problems with visitation. The first six and a half years, my son was sick a lot, which that interfered with the visitation process with him being ill. About six and a half years - - after six and a half years, we got into some conflict during a visitation pickup. I had my mother with me. We went to pick up my son. This was in the fall of 1999, and [the Child] was not feeling good at that time, but he was good enough to visit with me. So we put his bag in the car, and [the Child] was in the car, and my ex-wife started some derogatory comments about me in front of my mother. So I told my mother to get in the car. I said, you’re not going to talk to my mother about me, so my mother got in the car. [Defendant] got mad and went and got [the Child’s] bag out of the car and took [the Child] inside and said he’s too sick to go. He’s not going to visit with you this time. So my mom, who came up from Tampa, didn’t get to visit with her grandson.

After that, we started - - it used to be where - - before that time, [the Child] could come and visit with me around my work. I have to go to guard drill one weekend every month, which kind of messed up the rotation of every other weekend, so for six and a half years prior to that time, she was very flexible, and she helped me. And we would alternate, and I would still get to see him two weekends a month plus all the other times. But after that started a fury of she’s not going to allow him to come visit with me during - - when I had guard duty. It doesn’t do [the Child] any good when I have to be at work, and I was single at the time, so it wouldn’t have been any good for him to come over and be with a babysitter all weekend, but I hadn’t had a problem. But that started it.

Then we fought about that to get to where we could have an alternate weekend around that, and we won that, where I could see him around my work. There were some other issues - - continuing issues of switching things around where she said, well, you’ve said this, and you’re not going to pick him up, and this and that. I remember one time that she had planned for him [to] go to a math tutor, swim lesson, and several events - - and that is typical during my visitation. I said, okay, since you’ve got that scheduled, and he’s got all these things that he needs to do, I’ll

switch weekends with you, and I'd like to take him to UT Knoxville/Vanderbilt game. Let's switch that weekend. Well, she said, okay, we'll switch. The next time I saw him was Thanksgiving. We had a good Thanksgiving visitation. I said, I'll see you next weekend, and I'm going to take you to the Vanderbilt/Tennessee game. And she says - - well - - when I started to do that, she says, we didn't agree upon that. I said, yes, we did. I said, I've got tickets for [the Child] to go, and you had the math tutor and everything. I said, we made that switch, and she said, nope, you're not going to get him, so he didn't get to go to the ballgame. So I continue - - I've got the records of that. Records that I've kept where all the time she was switching things around me, and I try to do the best I can, and I tried to be flexible and work with her as much as I could for [the Child's] sake. But this Christmas that we are talking about, I never, ever, ever agreed not [to] see my son during Christmas.

Plaintiff was asked about Defendant's allegation that Plaintiff had struck the Child on a previous occasion. Plaintiff testified that while he, the Child, and Plaintiff's grandson were playing sword fighting with karate blockers, the Child accidentally got bumped on the head. Plaintiff testified that he immediately told Defendant about this injury when he brought the Child back to Defendant's home at the end of that visitation. Plaintiff also testified that on another occasion, while in Defendant's care, the Child broke his arm while playing backyard football. When asked if he ever intended to hurt the Child, Plaintiff stated: "Absolutely not. I would never want to hurt my son. Never, ever. I love him. There's no way."

Plaintiff denies ever having a conversation with Defendant about not picking up the Child on Christmas Eve per the visitation schedule. Plaintiff stated: "As a matter of fact, my brother was here from Tampa - - out of town for Christmas, and we were looking forward for [the Child] to come over that evening, and he had to leave the very next morning early, so that was his chance to see my son."

Plaintiff testified that he arrived at Defendant's home at approximately 8:35 p.m. on the evening in question. He testified:

[Defendant] came to the door bell, and she opened the door and invited me in. I stepped into the foyer. I said, hi, what did you-all get for Christmas? And she looked at me and said, what are you doing here? I said, I'm here to pick up my son for visitation according to the visitation procedures, and she says, no. You're supposed to get him tomorrow morning. I go, what? Tomorrow morning? I said, I'm supposed to have him 9:00 tonight. That's what the agreed order says. It's 9:00 p.m. I said, I'll just go outside and wait for him to get ready. So I very quietly turned around very nicely, closed the door very gently, walked down the sidewalk and got in my car and shut the door.

Plaintiff testified that “[m]aybe five or ten minutes” later the Child came outside and Defendant “stood at the stairs or back against her porch, down the sidewalk. Approximately 25 feet away.” Plaintiff testified:

[The Child] came down the sidewalk. I have an electric window. I rolled down my electric window. I said, hi, son, how are you doing? I said, where’s your bag? He says, what do I need a bag for? I said, well, you’re going to stay a week. You need to go get your bag. And he said, I’m not going with you. I said, well, just a second. So I opened my car door to get out to talk [to] my son. I shut the door slightly. I don’t remember closing it. But I shut the door. I’m standing at my car. My son’s right in front of me. I said, son, you need to go get your bag, because you’re going to need it. He said, no, I’m not going. I talked to [Defendant]. [Defendant] was standing down the sidewalk. I said, [Defendant], please tell [the Child] to go get his bag. She said, no, he doesn’t have to go get his bag. I said, [the Child’s first and middle name], which means you need to pay attention to what I’m telling you. That means discipline is going to follow. I said, [the Child’s first and middle name], go get your bag. No, I don’t have to go get my bag. I said, [the Child’s first and middle name], go get your bag. No, I don’t have to go get my bag. I said, [the Child’s first and middle name], go get your bag. He said, no. So I took him around and turned him by the shoulder and like rolling a bowling ball, I patted him like that (demonstrating). Go get your bag. There was no intent to hurt him by any ways or anything. It was just to encourage him to go get his bag.

Plaintiff testified that he struck the Child “[o]n the bottom with a pat....It was a palm - - the palm of my hand, left hand.” Plaintiff testified that the Child did not cry, whimper, fall down, or make any sound and then:

His mother came running - - rushing down the sidewalk very upset, very mad. Grabbed [the Child] by his left arm, took [the Child] down in front of me, away from her house, in front of me. She took him in front of my car, and she says, you’re not going to hit my son. I said, I didn’t hit [the Child]. I spanked him. I said, he’s my son, too, and I said, I am tired of your interfering with my visitation. Enough is enough. She saw her neighbor, Rita. She took [the Child] in front of my car and away from my car and started screaming hysterically, waving her arms. Rita, Rita, Rita, [the Child] has been struck. Eventually Rita came to the door, and she cracked the door, and she looked out, and somebody said, call the police. I’m not sure if it was [Defendant], my ex-wife, or Rita, but they said, call the police, and I said, fine, call the police.

Plaintiff testified that he was not waving his arms hysterically and that he did not use profanity. Plaintiff testified:

I've only patted on his pants or bottom three times in his entire life at the age of 12, because he's a good boy. But that night, it just happened, and I couldn't have my son disrespect me like that. And I asked her for help, and I didn't get any help. And it was my visitation. It was my Christmas, my turn.

Plaintiff testified:

I said, fine then, call the police. I walked back around my truck and got in the truck and waited. I saw [Defendant] take [the Child] back in front of my truck, back in front of me, down the sidewalk to get to the house, and then - - ...I dialed my wife on the cell phone, who was at home with my brother. I said, please bring me my visitation papers, because I thought when the policeman would come, he would want to see those and know that it was my time to be with my son....A few minutes later I got a call from my brother....He said, Wally, [Defendant] hates [your current wife]. It's not a good idea. This is Christmas Eve. You don't need to bring [your current wife] over there in the middle of this. It's going to escalate. He said, this is Christmas Eve, come on home. So I took his advice, and I very nicely backed out of the driveway and pulled right out. Went home peacefully. When I got home, I called the police to tell them what had happened and asked them for help....To go get my son....It was Christmas Eve. The dispatcher said it was kind of busy because of Christmas. That they would have a police officer call me back.

Plaintiff testified that because the police did not call him, he called them a second time approximately an hour later. Plaintiff testified that he was told that an officer would call him "so I waited and waited until about 11:00 and really couldn't sleep, but I just laid down all night just waiting for some help. Nobody ever called that night."

Plaintiff testified that on the following day:

Christmas day my brother had to go back to Tampa. I got up - - he had a very early flight so I took him back to the airport and dropped him off. Then I went by the Hermitage Police Station to try to get some help to go get my son, and I had my visitation papers to show that I was supposed to have him at the time, and when I went by the station, it was closed. It was Christmas, and I decided to wait until the next day, which was the 26th....I went with my wife back to the police station because I thought it would be open on the 26th, and they could help me. They weren't open, so I got on my cell phone and called the police at that time, and they offered to help me, and they said they would meet me. So they asked where would I like to meet, and I said, well, her house. And they said, no, somewhere close. So we met at Andrew Jackson schoolhouse, which is down the street from her residence.

Plaintiff testified that he met the police officers and showed them his visitation papers. One of the officers checked and discovered that there was a warrant for Plaintiff's arrest for domestic assault,

and the police arrested Plaintiff. Plaintiff was handcuffed and taken to jail where he had to spend twelve hours before he was allowed to be bailed out.

The domestic assault charge against Plaintiff was dismissed at a preliminary probable cause hearing approximately six months later. Plaintiff stated that he, Defendant, and the Child testified at the preliminary hearing. Plaintiff testified that he was under a court order during the six months between his arrest and the probable cause hearing, and explained: "I could not possess a weapon. I could have not have [sic] alcohol in my house. I could not make any contact in any way with [Defendant] or my son, [the Child]. So I couldn't do my visitation, couldn't see my son." Plaintiff gave his firearms to his wife's son to keep. Plaintiff's job with the Air Guard requires him to carry a firearm. Plaintiff testified that if he had been activated and was unable to carry a firearm, he "would be terminated and probably be fired." Plaintiff testified that he had to inform his commanding officer of the arrest and stated:

I had a very, very tough time with that, because he could have fired me right then, possibly. And it was kind of a very scary time to have to tell two of your bosses that you have been accused of something bad and threatened my whole life, everything I've worked for all my whole life. Twenty-seven and a half years. It would have destroyed - - you could lose your job, lose everything.

Plaintiff testified that he was able to resume his visitations with the Child after the charges against him were dismissed, but that their relationship has

been kind of interfered with. Kind of poisoned. I've tried to be the best father I can. I've got a briefcase under that table full of fighting to be a good father in court. That big briefcase right there. I'm doing the best I can. I know that my son may not love me right now. I hope that one day he will. But as a parent, I believe it's my responsibility to teach him to respect others and have respect. I'd like him to be a Christian. I'm just doing the best I can. I'm not perfect.

Plaintiff denied that on the evening in question, Defendant or the Child ever told him that the Child had not opened his gifts yet.

When Plaintiff was asked if he had ever hit the Child before, he stated:

No sir. I have patted him on his - - he was, like, four one time, and I was sitting in the dining room, and he was completely not listening to what I said, and I patted him on the pants, and he kind of stopped and listened. But it was just a pat. And I think I've done that maybe three times in his whole life.

Plaintiff stated:

I used it because of him being disrespectful, argumentative. He could not understand what was going on. It was my visitation, my time at 9:00. I didn't see it as a time to try to explain to him what he needed to do in front of another adult who knew it was right and refused to help me with it, and actually say, no, he doesn't have to go.

When asked if the Child resisted when Plaintiff grabbed him by the shoulders and turned him, Plaintiff replied: "No. He was already kind of moving away from me, because when I turned him, he started to move towards his mom, and as he was moving, I brushed him on the seat of his pants with my left hand." When asked what the Child's reaction was, Plaintiff stated:

He had no reaction whatsoever. He didn't cry. He didn't gasp....He walked towards his mother, and she came and grabbed him and took him back towards me, towards the car, in front towards the neighbor and said, you're not going to hit my son. I said, I did not hit my son. I spanked him. I said, he's my son, too. I said, I'm tired of you interfering with visitation. Enough is enough. Then she started waving her hands, Rita, Rita, and I saw the neighbor come out of the house.

Plaintiff testified that he was going to wait for the police that night at Defendant's house, but instead took his brother's advice, went home, got his court order showing the visitation schedule, and called the police from his house. When asked if he brought this action to get back at Defendant, Plaintiff testified: "It's not a get-back. It's doing what's right. If you have to be in fear that every time that you pick up your son that something like this was going to be put against you and end your career, wouldn't you want to protect yourself?"

Plaintiff's current wife ("Plaintiff's Wife") also testified at trial. She and Plaintiff were married in 2005 and had dated for approximately ten years before marrying. Plaintiff and Plaintiff's Wife had a falling out while they were dating, and Plaintiff's Wife at that time befriended Defendant. Plaintiff's Wife testified that Defendant asked Plaintiff's Wife to assist Defendant to "[b]asically to fix it to where [Plaintiff] had supervised visitation or no visitation at all." Plaintiff's Wife gave testimony for Defendant during a deposition and afterward Defendant spoke to Plaintiff's Wife. Plaintiff's Wife testified that Defendant said: "That I did okay, but I could have done better. I should have done basically what she had asked me to do, and I didn't. I didn't say enough to incriminate [Plaintiff]."

Plaintiff's Wife testified that Defendant told her: "That when [the Child] was little, if he had a picture that included [Plaintiff] in it, [the Child] would cut the heads out of his pictures." Plaintiff's Wife has heard Defendant refer to Plaintiff as the devil and "say she would do whatever she could to keep [Plaintiff] out of [the Child's] life. If it meant moving, she would move. She would relocate."

Plaintiff's Wife testified that she never has seen her husband be angry or abusive toward the Child and stated: "[Plaintiff] would never hurt [the Child]." She testified that since the incident:

[Plaintiff] is still not normal. He's not normal... Every time we get [the Child], he's on edge. He used to scuffle and play with [the Child]. He's scared to do that. He's afraid that if he accidentally gets hurt, then he's going to get blamed on something else. You don't know - - he doesn't know how to communicate with him, because he's afraid that he's going to say or do the wrong thing. He gets real tense. It causes friction between us because we don't know how to handle this. He's still hurt. I mean, this is his son. All he wants to do is be a good dad. That's all he wants to do is be a dad and have a family. That's it. That's all we're trying to do.

Plaintiff's Wife testified: "[The Child] doesn't show much respect to [Plaintiff]. He does whatever he can to ignore him. If it's staying up in his room by himself or whatever he can do to stay away from [Plaintiff]."

The Child, who was fourteen years old at the time of trial, testified. The Child testified that he was watching TV before Plaintiff arrived on the evening at issue. He was asked about when he was expecting to see his father that Christmas, and the Child testified: "I was just going to open my presents that morning, I thought, and then since my mom was off, I thought I'd just see him in maybe a couple of days or something. I wasn't sure." The Child described the incident at issue stating:

When he arrived at about 8:35 or so, my mother and I were watching TV, and so the doorbell rang, and my mom answered it, and it was him, and so I could hear him. He said in a sarcastic voice, well, did you get lots of good stuff? My mom said, well, I thought you were going to pick him - - I took the week off. I didn't think you were going to pick him up. He said, well, it's my visitation. And so she was like, okay. And then my mom came in the living room and said, [the Child], I'm sorry. You've got to get ready. And so I put some jeans on, because I had my pajamas and stuff on, so I walked out to the car, and I asked him if I could open my presents, and he - - ...He says, no, get your bag. And then he starts yelling, get in the car, get your bag, get in the car.

The Child testified that he was scared and stated: "[Plaintiff] grabbed my left arm and snapped me around real quick and hit me in the back....Above the belt, yes." The Child testified that Plaintiff used a closed fist. When asked what his reaction was, the Child stated "I was - - I wasn't going to get hit again, so I ran to my mom....She ran to me, and I ran to her, and then we ran to our neighbors, which she ran to our neighbor, and I was afraid to be left, like, on the steps, so I ran after her." The Child further testified:

Like, well, after my mom got Rita, our neighbor, Rita asked Mom - - my mom said, [Plaintiff] hit [the Child], and so she said, do you want me to call the police? And she didn't say anything. And he says, go ahead, call them. First of all, he said, that's BS, but he cussed right then. And he said, I'll hit him whenever I want, and then Rita asked, do you want me to call the police? And he said, go ahead and call

them.... Well, then I - - when I - - like, he's just running around and, like, screaming and hollering, so I run inside, and then my mom followed me, because Rita went back inside, and then when we got in there, she asked me if I was okay. And I said, well, he hit me hard. And then she looked at my back, and by then, the police were there, and so we explained our story to the police, and then they advised us to go downtown to get - -....

The Child testified that he and Defendant went downtown and Defendant told the judge what had happened. The Child testified that when he looked at his back in the mirror: "It was red."

When asked if he loved his mother, the Child answered "[y]es." When asked the same question about his father, the Child stated: "I don't know who likes him, including his wife. He's just mean to us." The Child denied telling Plaintiff that he was not going with him that evening.

Rita Bennett, Defendant's neighbor, testified about the evening in question stating:

I was sitting in my sunroom, and I heard my name being called. And so I went out on my deck, which is on the side of my building adjacent to [Defendant's] house, and [Defendant] was out there calling my name, and so was [Plaintiff] and [the Child]. [The Child] was holding onto his mother, and I said, what's the matter? And [Defendant] said that [Plaintiff] has struck [the Child]. And I said, what? And I said, do you want me to call the police? And she said, yes, and [Plaintiff] said, yes, do call the police.... Now, there was some cursing going on during these conversations, but he said, yes, call the police.... He was talking to [Defendant], and [Defendant] was saying to him, don't hit [the Child] again.... He said, he's my son, and I'll hit him again if I want to. So anyway, when they said call the police, I asked my husband to call the police. But I stayed on the deck, because I was fearful for [the Child] and [Defendant].

Ms. Bennett testified that Plaintiff was the one who was cursing. Ms. Bennett testified that Plaintiff stayed for about ten more minutes before leaving and then the police arrived.

At the conclusion of the proof, the Trial Court granted Defendant's motion for directed verdict finding and holding "that the motion for directed verdict was well taken because after removing all conflict in the evidence by construing it in the light most favorable to the Plaintiff, reasonable minds could not differ on the proposition that the element of lack of probable cause was not proved by the Plaintiff...."

Plaintiff appeals to this Court.

Discussion

While Plaintiff raises five issues on appeal, the dispositive issue is whether the Trial Court erred in directing a verdict for Defendant.

Our Supreme Court discussed the standard under which an appellate court must review a motion for a directed verdict in *Johnson v. Tennessee Farmers Mut. Ins. Co.*, stating:

In reviewing the trial court's decision to deny a motion for a directed verdict, an appellate court must take the strongest legitimate view of the evidence in favor of the non-moving party, construing all evidence in that party's favor and disregarding all countervailing evidence. *Gaston v. Tenn. Farmers Mut. Ins. Co.*, 120 S.W.3d 815, 819 (Tenn. 2003). A motion for a directed verdict should not be granted unless reasonable minds could reach only one conclusion from the evidence. *Id.* The standard of review applicable to a motion for a directed verdict does not permit an appellate court to weigh the evidence. *Cecil v. Hardin*, 575 S.W.2d 268, 270 (Tenn. 1978). Moreover, in reviewing the trial court's denial of a motion for a directed verdict, an appellate court must not evaluate the credibility of witnesses. *Benson v. Tenn. Valley Elec. Coop.*, 868 S.W.2d 630, 638-39 (Tenn. Ct. App. 1993). Accordingly, if material evidence is in dispute or doubt exists as to the conclusions to be drawn from that evidence, the motion must be denied. *Hurley v. Tenn. Farmers Mut. Ins. Co.*, 922 S.W.2d 887, 891 (Tenn. Ct. App. 1995).

Johnson v. Tennessee Farmers Mut. Ins. Co., 205 S.W.3d 365, 370 (Tenn. 2006).

With regard to malicious prosecution, our Supreme Court has instructed:

In order to establish the essential elements of malicious prosecution, a plaintiff must prove that (1) a prior suit or judicial proceeding was instituted without probable cause, (2) defendant brought such prior action with malice, and (3) the prior action was finally terminated in plaintiff's favor. *See Christian v. Lapidus*, 833 S.W.2d 71, 73 (Tenn. 1992); *Lewis v. Allen*, 698 S.W.2d 58, 59 (Tenn. 1985). The present case concerns the element of probable cause.

Probable cause is established where "facts and circumstances [are] sufficient to lead an ordinarily prudent person to believe the accused was guilty of the crime charged." *See Logan v. Kuhn's Big K Corp.*, 676 S.W.2d 948, 951 (Tenn. 1984); *Lewis v. Williams*, 618 S.W.2d 299, 303 (Tenn. 1981). However, this Court has also stated that "[t]he prosecutor must in good faith have honestly believed the accused was guilty of the crime charged." *See Logan*, 676 S.W.2d at 951; *Lewis*, 618 S.W.2d at 303. We now conclude that the existence of probable cause does not depend on the subjective mental state of the prosecutor.

A malicious prosecution is one brought in the absence of probable cause, and with malice. These two elements are distinct. Whereas malice concerns the subjective mental state of the prosecutor, appraisal of probable cause necessitates an objective determination of the reasonableness of the prosecutor's conduct in light of the surrounding facts and circumstances. *Accord Sheldon Appel Co. v. Albert & Oliker*, 47 Cal. 3d 863, 765 P.2d 498, 506, 254 Cal Rptr. 336, 344-45 (1989); Dobbs, *Belief and Doubt in Malicious Prosecution and Libel*, 21 Ariz. L. Rev. 607 (1979) (rejecting Restatement (Second) of Torts § 662 comment c (1977)).

Properly defined, probable cause requires only the existence of such facts and circumstances sufficient to excite in a reasonable mind the belief that the accused is guilty of the crime charged. While a mind "beclouded by prejudice, passion, hate and malice" is not "reasonable," *see Poster v. Andrews*, 183 Tenn. 544, 554, 194 S.W.2d 337, 341 (1946), the question whether a particular prosecutor is so motivated goes only to the element of malice. Probable cause is to be determined solely from an objective examination of the surrounding facts and circumstances.

Roberts v. Fed. Express Corp., 842 S.W.2d 246, 247-48 (Tenn. 1992). In *Roberts*, our Supreme Court specifically held "that where reasonable minds can differ as to the existence of probable cause a jury is to decide the issue,..." overruling previous law that held that the facts regarding probable cause were to be found by the jury but the ultimate determination was a matter of law to be made by the court. *Id.* at 249.

The Trial Court held that "reasonable minds could not differ on the proposition that the element of lack of probable cause was not proved by the Plaintiff...." We disagree. After a careful and thorough review of the record on appeal, construing all evidence in Plaintiff's favor and disregarding all countervailing evidence, as we must, we hold that reasonable minds could disagree as to whether Plaintiff proved the element of lack of probable cause. Certainly, Plaintiff presented material evidence that was in dispute relevant to the issue of probable cause, and doubt existed as to the conclusions to be drawn from that evidence. Because of this disputed evidence and the doubt as to the conclusions to be drawn from that evidence, Defendant's Motion for Directed Verdict should have been denied. We in no way mean to suggest that Plaintiff proved this element, merely that reasonable minds could disagree as to the conclusions to be drawn from this material evidence making this a proper question for the jury. We, therefore, vacate the Trial Court's grant of a directed verdict and remand this case to the Trial Court for a new trial.

Conclusion

The judgment of the Trial Court directing a verdict for Defendant is vacated, and this cause is remanded to the Trial Court for a new trial and for collection of the costs below. The costs on appeal are assessed against the Appellee, Elizabeth Payne Burton.

D. MICHAEL SWINEY, JUDGE